LCY v. TWY

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ABANG ISKANDAR JCA
MARY LIM JCA
[CIVIL APPEAL NO: B-02(A)-988-05-2018]
21 FEBRUARY 2019

FAMILY LAW: *Divorce – Petition for divorce – Dissolution of marriage, custody of children and distribution of matrimonial assets – Maintenance of children – Whether RM2,000 a month per child reasonable – Division of matrimonial assets – Extent of contributions made by each party considered –Whether domestic violence relevant consideration in determining custody to parent – Whether there was overwhelming evidence of domestic violence – Whether there was provocation justifying wife deliberately stabbing husband – Allegation of sexual abuse by domestic worker on one of the children – Whether proved – Whether husband ought to be granted sole guardianship, custody, care and control of children – Law Reform (Marriage and Divorce) Act, s. 76(2)(a)*

This was an appeal by the appellant/petitioner husband ('PH') against part of the order of the Judicial Commissioner ('JC') on a divorce petition filed by PH against the respondent wife ('RW'), seeking, *inter alia*, a dissolution of the marriage, custody of children and distribution of matrimonial assets. PH and RW were married and blessed with two children, a daughter LYR born in 2008 and a son LXJ born in 2012. Along with a matrimonial home in Bukit Jelutong ('matrimonial home'), they had three other properties, the Kulai Property, the Cheras property and the Kenchana Square. On 17 December 2015, a joint petition was filed. RW moved out of the matrimonial home while PH continued to live in the matrimonial home with the children. On 29 December 2015, RW converted to Islam. On 21 January 2016, a *decree nisi* was granted which was to be made absolute after three months, containing terms, *inter alia,* (i) guardianship and custody of the children to be given to PH; (ii) RW's access to the children subjected to the mutual agreement with PH; (iii) the children would not be influenced into embracing any new religion until they attain the age of majority; and (iv) Kulai Property be given to RW and Kencana Square be given to PH. Before the *decree nisi* could be made absolute, PH applied to set aside the *decree nisi* on the ground of RW's conversion. The High Court set aside the *decree nisi* and PH was given access to the children. On 24 February 2016, RW lodged a police report against the domestic worker ('PW14') for allegedly molesting LXJ. LXJ was admitted to the hospital between 7 March 2016 to 8 March 2016 for examination in relation to the sexual abuse allegation. On 11 May 2016, RW had unilaterally converted LYR and LXJ to Islam. Subsequently, PH filed the divorce petition and an interim consent

order was recorded whereby the parties agreed *inter alia* that the children shall not be influenced into practicing any religion and that the parties had alternate weekly care and control of the children. On 11 December 2016, PH was stabbed repeatedly by RW with a metal fork at the hospital where LXJ was admitted. A video recording was adduced by PH as evidence in the High Court on the incident. RW was later charged in the Magistrates Court for using criminal force on PH. The trial of the petition commenced at the High Court. In relation to the issue of custody, the JC found that (i) RW and her mother, RW2 were witnesses of truth; (ii) PW14 had behaved inappropriately towards LXJ; (iii) it was improbable for RW to concoct the stories of LXJ being sexually abused; (iv) the video recording by PH on RW's alleged domestic violence created doubt as to whether it was a genuine or a staged incident; and (v) it could safely be assumed that PH might need more time to run his companies as compared to RW who was not working full time. On maintenance of the children, the JC ordered that PH pay a monthly maintenance fee of RM2000 per month for each child until they attain the age of 18 years old. In respect of the matrimonial assets, the JC ordered that the Kulai Property be maintained in the name of RW as it was acquired by RW and it was never her intention to treat it as a matrimonial asset. As for the Cheras property, the High Court found that RW was helping her mother RW2 in acquiring this property and could not be held as being part of the matrimonial property. The JC further ordered that the matrimonial home be sold or disposed of at the prevailing market value and the net proceeds be divided equally between the parties. Aggrieved by the said orders of the JC, PH appealed to this court.

Held (allowing appeal)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) There was no compelling reason to disturb the order of the JC on maintenance of the children. It was in evidence that PH earned RM22,000 per month. Having regard to PH's means, the amount awarded per child per month was reasonable in the circumstances of the case. On the division of matrimonial assets, while there was evidence led on the contributions made by RW for the improvement of the matrimonial home, the JC erred in granting 50% of the current market value to RW. By s. 76(2)(a) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'), in exercising the power of the court to order division of matrimonial assets, the court shall have regard to the extent of the contributions made by each party. What was reasonable herein would be for RW to be granted 25% of the current market value of the matrimonial home. (paras 27-29)

(2) The JC had assumed that because PH had two companies to manage, he would have lesser time to take care of the children. The assumption arrived at by the JC was erroneous and against the weight of evidence. PH had testified that he was the managing director of only one company. RW had made reference to Geekhouse Sdn Bhd in her answer to petition

but a closer look at that pleading by RW revealed that Geekhouse Sdn Bhd had been wound up. In the circumstances, the JC was plainly wrong in her evaluation of the evidence which formed the premise as to why, among others, she had granted guardianship and custody to RW. (para 31)

(3a) On domestic violence where RW had caused PH to suffer injuries by stabbing PH with a fork, the JC had erred in doubting the veracity of the recording when there was overwhelming evidence including that of RW's own admission under oath that she had stabbed PH with a fork in front of the children. The JC had overlooked the fact that RW and PH had entered into a consent order where parties had agreed that the children shall reside with the parties on alternate basis for a week from 6pm on Sunday until 6pm the following Sunday. The consent order must be observed. After spending the whole week with the children, RW had unilaterally admitted LXJ into SJMC on the last day of her time. RW was supposed to hand over the children at 6pm on 11 December 2016 ie the date when the incident of domestic violence occurred. The transcript of the video recording showed that she was with the children at the hospital past 6.45pm which meant that PH had in fact allowed RW to be with the children for at least an extra 45 minutes. To say that PH had not accorded RW cordiality, understanding and that he was impatient, was in the circumstances, not quite accurate. Further, there was no such provocation that could justify RW to consciously and deliberately injure PH in front of the children and in public. RW had chosen to ignore the terms of the order that she had consented to. (paras 32-36)

(3b) Domestic violence is a relevant consideration in determining whether custody ought to be granted to a parent, as undeniably, the abuse of a spouse in front of the children was harmful to the emotional well-being of the children. This court took into serious consideration that RW had pleaded guilty to the amended charge under s. 352A of the Penal Code in relation to the incident at the hospital and had been convicted of the same. The JC had failed to judicially consider the evidence as a whole before concluding as she did on the issue of domestic violence. What happened at the hospital was the manifestation of the uncontrollable temper of RW. She was capable of not only hurting PH physically but the children as could be seen from the injuries suffered by LXJ whose ear was blue black after it was pinched by RW. This court failed to see how LXJ had to be subjected to such physical abuse at the tender age of three years old. (paras 36 & 37)

(4a) On the allegation of sexual abuse by the domestic worker, the JC had failed to consider and evaluate the evidence adduced by several independent professional witnesses. The Welfare Officer PW3 did not support the finding of the JC on the sexual abuse. The child psychiatrist

PW6 testified that she did not see LXJ exhibiting any sexualising behaviour hence there was no evidence from PW6 to lend credence to the findings of the JC that LXJ had been sexually abused by PW14. The paediatrician PW10 had also conducted an examination of LXJ and found that he had not been sexually abused. The investigating officer PW15 had stated that this case ought not to proceed. Given the above testimonies of the independent witnesses, the JC was plainly wrong in concluding that RW and her mother, RW2, were witnesses of truth and that there was inappropriate behaviour by PW14. (paras 39-47)

(4b) It was in evidence that LRX had a medical condition called Hydrocele *ie*, a swelling of the scrotum. PH and RW had begun the traditional treatment of applying betel leaves on LXJ's scrotum and it was this traditional treatment that was carried out by PW14 on LXJ before the marriage broke down irretrievably. When LXJ referred to 'kakak touched my kuku-bird', that was in relation to the incident prior to the break down of the marriage. The police report lodged by RW on the allegation of sexual abuse by PW14 in relation to the traditional treatment for the medical condition of LXJ, clearly could not be maintained. (para 49)

(5) For two years, each party had the children's care and control on an alternate weekly basis. The order of the High Court had effectively disrupted the children's routine. Now that RW had re-married, the children's lives would be further disrupted and subjected to drastic changes. In seeking the sole custody of the children, RW was putting her own interest above that of the children's. In light of the above, there were merits in the appeal. This court thus set aside the orders of the High Court on guardianship, custody care and control of the children save for certain prayers. PH was granted sole guardianship, custody, care and control of LYR and LXJ and RW was granted access to the children. This court also allowed the prayer sought for by PH that the matrimonial home be registered in PH's sole name and that the said property shall remain and be retained by PH on condition that PH pay RM25% of the current market value of the property as assessed by a licensed valuer, to be appointed by RW. (paras 50-52)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan oleh perayu/pempetisyen suami ('PS') terhadap sebahagian perintah Pesuruhjaya Kehakiman ('PK') atas petisyen perceraian terhadap responden isteri ('RI') menuntut, antara lain, pembubaran perkahwinan, hak penjagaan kanak-kanak dan pengagihan aset-aset perkahwinan. PS dan RI telah berkahwin dan dikurniakan dua orang anak, seorang anak perempuan LYR dilahirkan pada 2008 dan seorang anak lelaki LXJ dilahirkan pada 2012. Bersama-sama dengan satu kediaman perkahwinan di Bukit Jelutong, ('rumah kelamin'), mereka mempunyai tiga lagi hartanah, iaitu hartanah

Kulai, hartanah Cheras dan Kenchana Square. Pada 17 Disember 2015, petisyen bersama telah difailkan. RI telah pindah keluar dari kediaman perkahwinan sementara PS sambung tinggal di rumah kelamin bersama-sama anak-anak mereka. Pada 29 Disember 2015, RI telah menganut agama Islam. Pada 21 Januari 2016, satu perintah *nisi* dibenarkan yang akan dibuat mutlak selepas tiga bulan, mengandungi terma-terma, antara lain (i) penjagaan dan hak jagaan anak-anak diberikan kepada PS (ii) akses RI terhadap anak-anak tertakluk pada perjanjian sesama dengan PS (iii) anak-anak tidak akan terpengaruh untuk menganuti agama-agama baharu sehingga mereka mencapai umur dewasa; dan (iv) hartanah Kulai diberikan kepada RI dan Kencana Square diberikan kepada PS. Sebelum perintah *nisi* dimuktamadkan, PS memohon mengetepikan perintah *nisi* tersebut atas alasan penganutan RI. Mahkamah Tinggi mengetepikan perintah *nisi* dan PS diberikan akses kepada anak-anak. Pada 24 Februari 2016, RI membuat laporan polis terhadap pembantu rumah ('PW14') atas dakwaan telah mencabuli LXJ. LXJ dimasukkan ke hospital antara 7 Mac 2016 sehingga 8 Mac 2016 untuk pemeriksaan berhubungan dakwaan penderaan seksual. Pada 11 Mei 2016, RI telah, secara unilateral, menukarkan agama LYR dan LXJ ke agama Islam. Kemudian, PS memfailkan petisyen perceraian dan satu perintah persetujuan sementara direkodkan dan pihak-pihak telah bersetuju, antara lain, bahawa anak-anak tidak akan dipengaruhi untuk mengamalkan apa-apa agama dan pihak-pihak akan mempunyai penjagaan dan kawalan selang seminggu ke atas anak-anak. Pada 11 Disember 2016, PS telah ditikam beberapa kali oleh RI dengan garpu logam di hospital di mana LXJ sedang menjalani rawatan. Satu rakaman video dikemukakan oleh PS sebagai keterangan di Mahkamah Tinggi berkenaan kejadian itu. RI kemudiannya dituduh di Mahkamah Majistret atas penggunaan kekerasan jenayah atas PS. Perbicaraan petisyen dimulakan di Mahkamah Tinggi. Berkenaan isu hak penjagaan, PK mendapati bahawa (i) RI dan ibunya, RI2, adalah saksi-saksi yang bercakap benar; (ii) PW14 telah berkelakuan dengan tidak sewajarnya terhadap LXJ (iii) agak mustahil untuk RI mereka cerita bahawa LXJ didera secara seksual; (iv) rakaman video oleh PS berkenaan keganasan rumah tangga RI mewujudkan keraguan sama ada ini benar atau kejadian yang dirancangkan; dan (v) adalah selamat untuk menganggap PS mungkin memerlukan lebih masa untuk menguruskan syarikat-syarikatnya berbanding RI yang tidak bekerja sepenuh masa. Berkenaan nafkah anak-anak, PK memerintahkan PS membayar nafkah bulanan RM2000 setiap bulan untuk setiap anak sehingga mereka mencapai 18 tahun. Berkaitan aset-aset perkahwinan, PK memerintahkan hartanah Kulai dikekalkan dalam nama RI kerana telah diperoleh oleh RI dan bukan niatnya untuk menganggapnya sebagai aset perkahwinan. Berkenaan hartanah Cheras pula, Mahkamah Tinggi mendapati bahawa RI telah menolong ibunya memperoleh hartanah itu dan ini tidak boleh diangap sebagai hartanah perkahwinan. PK juga

A memerintahkan kediaman perkahwinan dijual atau diletakkan pada harga nilai pasaran dan hasil bersih itu dibahagikan sama rata antara pihak-pihak yang terlibat. Terkilan dengan perintah-perintah PK tersebut, PS merayu ke mahkamah ini.

Diputuskan (membenarkan rayuan)

B **Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:**

(1) Tiada alasan yang kukuh untuk mengganggu perintah PK berkenaan nafkah anak-anak. Terdapat bukti bahawa PS memperolehi gaji RM22,000 sebulan. Mengikut kemampuan PS, jumlah yang
C diawardkan setiap anak setiap bulan adalah munasabah mengikut keadaan kes. Berkenaan pembahagian aset-aset perkahwinan, walaupun terdapat keterangan bahawa RW telah membuat sumbangan untuk peningkatan rumah kelamin itu, PK tersilap apabila memberikan 50% daripada nilai pasaran semasa kepada RW. Melalui
D s. 76(2)(a) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('LRA'), dalam melaksanakan kuasa mahkamah untuk memerintahkan pembahagian aset-aset perkahwinan, mahkamah akan mengambil kira takat sumbangan yang dibuat oleh setiap pihak. Apa yang munasabah di sini adalah untuk RI diberikan
E 25% harga nilai pasaran semasa rumah kelamin itu.

(2) Pesuruhjaya Kehakiman membuat anggapan bahawa, oleh sebab PS mempunyai dua syarikat untuk diurus, dia tidak akan mempunyai masa untuk menjaga anak-anak. Anggapan yang dibuat oleh PK adalah salah dan menentang berat keterangan. PS telah memberi testimoni
F bahawa dia adalah pengarah urusan untuk hanya satu syarikat sahaja. RI telah membuat rujukan pada Geekhouse Sdn Bhd dalam jawapan petisyen tetapi, jika diteliti, pliding RI mendedahkan Geekhouse Sdn Bhd telah digulung. Dalam keadaan itu, PK jelas khilaf dalam penilaian keterangan yang membentuk premis berkenaan kenapa,
G antara lain, dia telah memberikan penjagaan dan hak jaga kepada RI.

(3a) Berkenaan keganasan rumah tangga di mana RI telah menyebabkan PS mengalami kecederaan ditikam dengan garpu, PK tersilap dalam meragui kebenaran rakaman apabila terdapat keterangan kuat termasuk pengakuan bawah sumpah RI sendiri bahawa dia telah
H menikam PS dengan garpu di depan anak-anak mereka. PK terlepas pandang fakta bahawa RI dan PS telah memasuki satu perintah persetujuan yang menyatakan pihak-pihak bersetuju anak-anak akan tinggal bersama-sama pihak-pihak atas asas silih ganti selama seminggu dari 6 petang hari Ahad hingga 6 petang Ahad berikutnya. Perintah
I persetujuan harus dipatuhi. Selepas bersama-sama dengan anak-anak

selama seminggu, RI memasukkan LXJ ke hospital pada hari terakhir gilirannya. RI sepatutnya menyerahkan anak-anak pada 6 petang 11 Disember 2016 iaitu tarikh apabila keganasan rumah tangga itu berlaku. Transkrip video menunjukkan RI bersama-sama dengan anak-anak di hospital pada pukul 6.45 petang yang bermaksud PS telah membenarkan RI bersama-sama dengan anak-anak untuk masa tambahan 45 minit. Untuk menyatakan PS tidak memberikan RI kemesraan serta pemahaman dan bahawa PS bukan penyabar, dalam keadaan tersebut, tidak tepat sama sekali. Tambahan, tiada provokasi yang boleh menjustifikasikan RI untuk secara sedar dan sengaja mencederakan PS di depan anak-anak dan di tempat awam. RI telah memilih untuk mengendahkan terma-terma perintah yang dipersetujuinya.

(3b) Keganasan rumah tangga adalah pertimbangan relevan dalam menentukan sama ada hak penjagaan harus diberi kepada seorang ibu atau bapa, kerana tidak dapat dinafikan, penderaan satu pasangan di depan anak-anak boleh memudaratkan kesejahteraan emosi anak-anak. Mahkamah ini mengambil kira secara serius bahawa RI telah mengaku salah terhadap pindaan pertuduhan bawah s. 352A Kanun Keseksaan berhubungan kejadian di hospital dan telah disabitkan. Pesuruhjaya Kehakiman telah gagal mengambil kira secara penghakiman keterangan keseluruhannya sebelum mencapai kesimpulan berkenaan isu keganasan rumah tangga. Apa-apa yang telah berlaku di hospital adalah manifestasi kemarahan tidak tertahan RI. RI mampu bukan sahaja untuk menyakitkan PS tetapi anak-anaknya juga seperti yang dapat dilihat daripada kecederaan yang dialami LXJ yang telinganya lebam-lebam selepas dicubit oleh RI. Mahkamah ini gagal melihat bagaimana LXJ didera secara fizikal pada usia muda tiga tahun.

(4a) Berkenaan dakwaan penderaan seksual oleh pembantu rumah, PK gagal mengambil kira dan menilai keterangan yang dikemukakan oleh beberapa saksi-saksi profesional bebas. Pegawai Kebajikan PW3 tidak menyokong dapatan PK berkenaan penderaan seksual itu. Pakar psikiatri kanak-kanak PW6 memberi testimoni bahawa dia tidak melihat LXJ menunjukkan apa-apa kelakuan seksual oleh itu tiada keterangan daripada PW6 untuk memberi kredibiliti pada dapatan-dapatan PK bahawa LXJ telah didera secara seksual oleh PW14. Pakar pediatrik PW10 juga telah menjalankan pemeriksaan terhadap LXJ dan mendapati anak itu tidak didera secara seksual. Pegawai penyiasat PW15 telah menyatakan bahawa kes ini tidak perlu diteruskan. Memandangkan terdapat beberapa testimoni saksi-saksi bebas tersebut, PK terkhilaf apabila memutuskan bahawa RI dan ibunya, RI2, adalah saksi-saksi yang bercakap benar dan bahawa terdapat kelakuan yang tidak kena oleh PW14.

(4b) Terdapat keterangan bahawa LRX mempunyai keadaan kesihatan dipanggil Hydrocele iaitu bengkak kerandut buah zakar. PS dan RI telah memulakan rawatan tradisional mengguna pakai daun-daun sirih ke atas zakar LXJ dan rawatan tradisional ini yang telah dilakukan oleh PW14 ke atas LXJ sehingga rumah tangga mereka pecah belah. Apabila LXJ merujuk pada 'kakak touched my kuku-bird', itu berhubungan dengan kejadian yang berlaku sebelum rumah tangga itu pecah belah. Laporan polis yang dibuat oleh RI berkenaan dakwaan penderaan seksual oleh PW14 berhubungan dengan rawatan tradisional untuk keadaan kesihatan LXJ, jelas tidak boleh dikekalkan.

(5) Selama dua tahun, setiap pihak mempunyai hak penjagaan dan kawalan terhadap anak-anak atas asas silih berganti setiap minggu. Perintah Mahkamah Tinggi secara efektif telah mengganggu rutin anak-anak. RI juga sekarang telah berkahwin lain, dan ini akan lebih mengganggu kehidupan anak-anak kerana mereka akan mengalami beberapa perubahan yang drastik. Memandangkan perkara itu terdapat merit-merit dalam rayuan. Oleh itu, mahkamah ini mengetepikan perintah-perintah Mahkamah Tinggi berkenaan penjagaan, hak penjagaan dan kawalan jagaan anak-anak kecuali untuk beberapa tuntutan. PS diberikan penjagaan, hak penjagaan dan kawalan tunggal atas LYR dan LXJ dan RI diberi akses kepada anak-anaknya. Mahkamah ini juga membenarkan tuntutan PS bahawa rumah kelamin didaftarkan dalam nama tunggal PS dan bahawa hartanah tersebut akan dikekalkan oleh PS atas syarat bahawa PS membayar 25% nilai pasaran semasa hartanah itu atas taksiran oleh penilai berlesen, dilantik oleh RI.

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Kedah Cement Sdn Bhd v. Masjaya Trading Sdn Bhd [2007] 3 MLJ 597 ***(refd)***

Mahabir Prasad v. Mahabir Prasad [1982] 1 MLJ 189 ***(refd)***

Re KO (an infant) [1990] 1 LNS 8 HC ***(refd)***

YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 CA ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 76(2)(a), 88(2), (3), 92

Penal Code, s. 352A

Rules of the Court of Appeal 1994, r. 7

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For the respondent - Rohani Ibrahim & Khairul Amin Abdullah; M/s Amin, Nizam & Rohani

[Editor's note: For the High Court judgment, please see LCY v. TWY [2018] 1 LNS 883 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] This was an appeal by the appellant/petitioner husband ("PH") against part of the order of the learned Judicial Commissioner ("JC") on a divorce petition filed by the PH against the respondent wife ("RW"), seeking for, *inter alia,* a dissolution of the marriage, custody of children and distribution of matrimonial assets.

[2] For the reasons that follow, we had unanimously allowed the appeal.

Background Facts

[3] PH and RW were married on 23 December 2006. They were blessed with two children, a daughter ("LYR") and a son ("LXJ"). LYR was born on 23 March 2008 while LXJ was born on 23 September 2012. The matrimonial home was at No. 14, Jalan Teratak, U8/96D, Bukit Jelutong, Shah Alam, Selangor. There were other properties which were the subject of the matrimonial dispute, namely:

(i) PTD 74299, Lebuh Putra Utama, Bandar Putra, Kulai, Johor ("the Kulai Propety");

(ii) No. 19, Jalan SP5/3, Taman Segar Perdana, Kajang, Selangor ("the Cheras property"); and

(iii) Parcel No. K03-07-07, Type F1, Level 07, Building No. Block 3 Kechana Square ("the Kenchana Square").

[4] On 17 December 2015, a joint petition was filed. About end of December 2015, RW moved out of the matrimonial home. PH continued to live in the matrimonial home with the children. On 29 December 2015, RW converted to Islam.

[5] On 21 January 2016, a *decree nisi* was granted which was to be made absolute after three months. The terms of the *decree nisi* among others were:

(i) guardianship and custody of the children to be given to PH;

(ii) RW's access to the children will be subject to the mutual agreement with PH;

(iii) the children would not be influenced into embracing any new religion until they attain the age of majority; and

(iv) the Kulai Property be given to RW and the Kencana Square be given to PH.

[6] Before the *decree nisi* could be made absolute, PH applied to set aside the *decree nisi* on the ground of RW's conversion. The High Court set aside the *decree nisi* and PH was given access to the children.

[7] On 23 February 2016, PH lodged a police report against RW on her behavior after the *decree nisi*. On 24 February 2016, RW lodged a police report against the domestic worker for allegedly molesting LXJ. On 28 February 2016, police commenced investigation on RW's allegation against the domestic worker.

[8] LXJ was admitted to the Shah Alam Hospital between 7 March 2016 - 8 March 2016 for examination in relation to the sexual abuse allegation.

[9] On 11 May 2016, RW had unilaterally converted LYR and LXJ to Islam. This unilateral conversion of the children was challenged by PH *vide* a judicial review proceedings in the High Court Kuala Lumpur. By the decision of the Federal Court in *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145, the unilateral conversion of the children would have been wrong in law.

[10] On 11 May 2016, PH filed the divorce petition. On 6 June 2016, an interim consent order was recorded whereby parties agreed, *inter alia,* that the children shall not be influenced into practicing any religion, which includes visiting any mosques or places of worship, praying, receiving any religious teaching, wearing of hijab, circumcision and/or fasting during the month of Ramadhan. The other term recorded was on the parties' alternate weekly care and control of the children.

[11] On 11 December 2016, PH was stabbed by RW repeatedly with a metal fork at Subang Jaya Medical Centre ("SJMC"), where LXJ was admitted. A video recording was adduced by PH as evidence in the High Court on the incident. RW was later charged in the Petaling Jaya Magistrate's Court for using criminal force on PH.

[12] The trial of the petition commenced on 5 December 2016 and it was first heard by the learned JC who has since retired. The learned JC who took over conduct of the petition continued with the cross-examination of PW14 (out of a total of 19 witnesses called by PH). PW14 was the domestic worker referred to earlier. On 27 April 2018, the learned JC delivered her decision. Particularly on the issue of custody, maintenance and division of matrimonial assets, judgment was entered in favour of RW.

Decision Of The High Court

[13] In relation to the issue of custody, the findings of the learned JC may be summarised as follows:

(i) RW and her mother, RW2 were witnesses of truth;

(ii) PW14 had behaved inappropriately towards LXJ;

(iii) it was improbable for RW to concoct the stories of LXJ being sexually abused as RW is a highly educated woman who would understand the repercussions of perjury and how it would impact her right for custody, care and control of the said children in these proceedings;

(iv) the video recording by PH on RW's alleged domestic violence created doubt as to whether it was a genuine or a staged incident; and

(v) it can safely be assumed that PH might need more time to run his companies as compared to RW who is not working full time.

[14] The learned JC acknowledged that by s. 88(2) of the Law Reform (Marriage and Divorce) Act 1976 ("the LRA"), it is mandatory for the court to consider the welfare of the child as being paramount. Reference was made, *inter alia,* to *Mahabir Prasad v. Mahabir Prasad* [1982] 1 MLJ 189. Her Ladyship cited several authorities in support of the proposition that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years. On the facts, the learned JC found that the presumption that it is for the good of the child below the age of seven years to be with the mother as stipulated in s. 88(3) of the LRA, has not been successfully rebutted by PH. Her Ladyship, therefore, held that the custody of the children, of ten years and five years, respectively, should be with RW. Her Ladyship further found that it was undesirable to disturb the lives of the said children by a change of custody and that unless and until changes in the circumstances dictate, there must be stability, continuity and objectivity in the life of the said children in their growing and nurturing years.

[15] On maintenance of the said children, the learned JC ordered that PH shall pay a monthly maintenance of RM2,000 (with an increase of 10% yearly) per month for each child until they attain the age of 18 years old. PH was also ordered to pay for the medical and dental expenses of the children, and for the education costs of the said children until the children attained the age of 23 or upon completing tertiary education (first degree), whichever comes first, with the school and university to be agreed to by RW.

[16] In respect of the matrimonial assets, the learned JC ordered that the Kulai Property is to be maintained in the name of RW. Her Ladyship found that this asset was acquired by RW and it was never her intention to treat

it as a matrimonial asset. As for the Cheras property, the learned JC found that RW was just helping her mother, RW2, in acquiring this property since RW2 was not qualified for a housing loan as her income as a confinement lady was not consistent. In the circumstances of the case, the learned JC ruled that the Cheras property which was irrefutably acquired by RW under the joint name with her mother cannot be held out as being part of the matrimonial property.

[17] As regards the matrimonial home, the learned JC found that although it was acquired by PH before the marriage, the matrimonial home has been substantially improved by RW. The learned JC further found that this fact was corroborated by the evidence of PH when PH acknowledged that RW did contribute towards the matrimonial home before they moved in and that RW did the renovations to the matrimonial home. The learned JC considered the argument by PH that he has repaid RW for her advance using his monies from Public Mutual Fund. Her Ladyship found that this argument was rebutted by RW when she showed proof that the said fund was bought using her EPF money. Her Ladyship, therefore, ordered that the matrimonial home be sold or disposed of at the prevailing market value and the net proceeds be divided equally between the parties or that either party may elect to buy out the other undivided share (50%) in the said property at the prevailing market value.

[18] Aggrieved by the order of the learned JC on custody, maintenance of the children and the distribution of the matrimonial assets, PH appealed to this court.

[19] After the decision of the High Court and pending the hearing of the appeal, the following incidents occurred, *ie*:

(i) PH took out contempt proceedings against RW for being in breach of the interim consent order, in particular for bringing the children, *inter alia* to the mosque. The High Court dismissed the committal proceedings. The decision of the High Court was reversed by this court. This court found RW guilty of contempt for seven out of 11 charges preferred against her in the contempt proceedings;

(ii) on the complaint of domestic violence (see para. 11 earlier), RW pleaded guilty for the offence under s. 352A of the Penal Code, *ie*, for using criminal force on PH and was fined; and

(iii) RW married Abdul Muein Abd Rahman (who has three teenage children) as his second wife.

[20] The above matters were admitted as further evidence under r. 7 of the Rules of the Court of Appeal 1994.

The Appeal

[21] Before us, PH canvassed the following issues:

(i) that the sole guardianship and sole custody that was granted by the High Court to RW with only a weekend access to PH, was made without the learned JC assessing the evidence led for PH;

(ii) that the order for maintenance was arbitrarily made without proof of expenses of the children;

(iii) that in making the order for the division of the matrimonial home, the learned JC failed to consider that it was acquired solely by PH and that the learned JC erred in inclining towards equality of division.

[22] In respect of the issue of custody, the complaint of PH was essentially that the learned JC failed to assess the evidence led for PW and that the learned JC erred in the following respects:

(iv) the learned JC did not consider the unilateral conversion of the children to Islam by RW;

(v) the learned JC did not consider whether RW is a fit mother;

(vi) the learned JC granted sole guardianship to RW without making an finding of fact that PH is unfit to be a guardian;

(vii) the learned JC erred in law when she made RW the sole guardian of the children when Muslim women cannot be guardians of their children; and

(viii) the learned JC failed to consider that the allegations of sexual abuse was for RW to gain an upper hand in the divorce proceedings.

[23] On maintenance, it was highlighted by learned counsel for PH that RW did not tender any evidence to support her claim that the children should receive RM2,000 per child per month. In this regard, it was further submitted that the learned JC had put the cart before the horse, *ie*, she made a finding of fact that since PH's earning was approximately RM22,000 per month, the children should receive RM2,000 per month each for maintenance without any proof as to their monthly expenses.

[24] On the matrimonial home, it was argued for PH that the learned JC erred in law in taking into account the evidence of the alleged contributions of the matrimonial home by RW when it was not put to PH in cross-examination that RW paid RM40,000 as renovation costs; when PH during cross-examination admitted that RW did lend him some money and that he had re-paid every single part of it with his Public Mutual Funds; when the evidence of PH on the repayment to the RW was not challenged by RW.

[25] In urging us to dismiss the appeal, in essence, learned counsel for RW submitted that if custody, care and control of the children be given to PH, it will affect the morality of the children; that PH will delegate the task to the domestic worker; that the incident of RW's violence was due to the provocation by PH and that the learned JC was correct on the order made in respect of the matrimonial home as RW had contributed towards the substantial improvement of the asset.

Our Decision

[26] The principle of law on appellate intervention is settled. In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, the Federal Court reiterated the principle as follows at p. 476:

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 1 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785 where it was held at p. 800:
>
> > It is well settled law that an appellate court will not generally speaking intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of the evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[27] At the outset we wish to state that, applying the above principles, we found no compelling reason to disturb the order of the learned JC on maintenance of the children. It was in evidence that PH earned RM22,000 per month. Section 92 of the LRA provides:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost himself.

[28] Having regard to PH's means, we were of the view that the amount awarded per child per month was reasonable in the circumstances of the case. More so when it was not submitted before us that the amount ordered to be paid by PH should be varied. What was submitted and prayed for by PH was for RW to contribute 30% of the maintenance for the children, which prayer we had dismissed.

[29] On the division of the matrimonial assets, the grievance of PH was on the order of the learned JC granting 50% of the current market value of the matrimonial home, which was acquired solely by PH prior to the marriage. In this regard, while we agree with the learned JC that there was evidence led on the contributions made by RW for the improvement of the matrimonial home, we were of the view that her Ladyship erred in granting 50% of the current market value to RW. By s. 76(2)(a) of the LRA, in exercising the power of the court to order division of matrimonial assets, the court shall have regard to the extent of the contributions made by each party. In our judgment, taking into account the extent of RW's contribution, what is reasonable would be for RW to be granted 25% of the current market value of the matrimonial home.

[30] The key point of the appeal was on the issue of custody, where the learned JC made the following finding:

> [32] In the present case, both PH and RW hurled allegations of unsuitability and have provided reasons why sole guardianship, custody, care and control of the children be given to them which allows me to conclude that both parties deem the other unfit to parent the said children of the marriage. However, those allegations remain merely that, since both parties could not and/or did not adduce any sufficient materials of probative value to support such allegations. That notwithstanding, I had observed the unrebutted facts that RW took care of the family since 2006 when they were married and until 2012 when they decided to have a maid to assist RW when she delivered the said boy in 2012. At present, RW is not working and is a stay home mother whereas PH is working and is taking care of two companies with income of RM22,000.00 a month not including dividends, which to my mind shows that his companies are doing well and I can safely assume that he might need more time to run his companies as compared to RW who is not working full time.

[31] Apparent from the above is that the learned JC assumed that because PH had two companies to manage, he would have lesser time to take care of the children. The assumption arrived at by the learned JC was erroneous and against the weight of evidence. PH had testified that he is the Managing Director of only one company (core bundle vol. 5: p. 766). RW had made reference to Geekhouse Sdn Bhd in her answer to petition but a closer look at that pleading by RW revealed that Geekhouse Sdn Bhd has been wound up (core bundle vol. 5: p. 783). In the circumstances, the learned JC was plainly wrong in her evaluation of the evidence which formed the premise as to why, among others, she had granted guardianship and custody to RW.

[32] On domestic violence where RW had caused the PH to suffer injuries by stabbing PH with a fork, the learned JC stated that:

> [33] PH argued that RW's act of domestic violence against PH in the presence of both the children had also amounted to domestic violence against the children and the children were referred to a psychiatrist. I take note that this report is the work of a private practitioner appointed by PH. At this juncture I take this report with caution and tread carefully as it could be self-serving of the party and it is not by a duly court appointed professional for purpose of impartiality. However, I had objectively observed and noted that the marriage between PH and RW lasted for ten (10) years without any evidence to show there was any issue of violence or domestic violence against PH and/or the said children. As can be seen the allegation of domestic violence only *(sic)* arise when RW decided to leave the marriage. I refer to the issue of domestic violence, the incident at SJMC where the RW was alleged to have injured PH with a fork .... The fact that PH was busy recording the whole incident lead me to infer safely that it was done on purpose and was not to be taken as an impromptu incident as such. It therefore raises the question or put us on inquiry as to whether it was genuine or a staged incident which created doubt in my mind on the veracity of the recording .... .

[33] We found that the learned JC erred in doubting the veracity of the recording when there is overwhelming evidence including that of RW's own admission under oath that she had stabbed PH with a fork in front of the children. The learned JC had stated that the said altercation between PH and RW was not without provocation from PH. She opined so because PH seemed to be impatient and seemed to be chasing RW away from the hospital ward when he kept taunting and repeating the words that RW's time was up. Her Ladyship had also found that PH had failed to accord RW cordiality, understanding and compassion for a mother to spend time with a sick child at that time.

[34] In coming to the above conclusion, the learned JC had overlooked the fact that RW and PH had entered into a consent order dated 6 June 2016, where parties had, *inter alia,* agreed that the children shall reside with the parties on an alternate basis for a week from 6pm on Sunday until 6pm the following Sunday. It goes without saying that the consent order must be observed.

[35] After spending the whole week with the children, RW had unilaterally admitted LXJ into SJMC on the last day of her time. RW was supposed to hand over the children at 6pm on 11 December 2016, *ie*, the date when the incident of domestic violence happened. The transcript of the video recording showed that she was with the children at SJMC past 6.45pm, which means that PH had in fact allowed RW to be with the children for at least an extra 45 minutes. To say that PH had not accorded RW cordiality, understanding and that he was impatient was, in the circumstances not quite accurate.

[36] Even assuming for a moment that PH had not accorded RW such cordiality and understanding for her to be with LXJ, we found no such provocation which could justify RW to consciously and deliberately injure PH in front of the children and in public. Surely there were other ways in which RW may monitor LXJ's condition. RW however chose to ignore the terms of the order that she had consented to. It must be noted that the existence of domestic violence, is a relevant consideration in determining whether custody ought to be granted to a parent, as undeniably, the abuse of a spouse in front of the children is harmful to the emotional well-being of the children. We further took into serious consideration that RW had on 11 July 2018, pleaded guilty to the amended charge under s. 352A of the Penal Code in relation to the incident at SJMC. She has since been convicted for the same.

[37] The learned JC failed to judicially consider the evidence as a whole before concluding as she did on the issue of domestic violence. In our view, what happened at SJMC was the manifestation of the uncontrollable temper of RW. She was capable of hurting not only PH physically but the children as can be seen from the injuries suffered by LXJ whose ear was blue black after it was pinched by RW. Having seen the picture of the LXJ's ear, we were unable to accept that RW was merely trying to discipline LXJ. While it may be RW's right and duty to discipline LXJ, we failed to see how LXJ has to be subjected to such physical abuse at the tender age of three years old.

[38] The learned JC stated that she had on 18 August 2017 met and interviewed the children where they had expressed their wish to stay with their mother and that she had taken due cognisance of this fact. In this regard, we endorsed the words of Edgar Joseph Junior J in *Re KO (an infant)* [1990] 1 LNS 8; [1990] 1 MLJ 494 that:

> … how influential an infant's wishes are will clearly depend upon the extent to which they coincide with his best interests in the opinion of the court. In *G v. G*, Dunn LJ said that it was extremely dangerous to place decisive weight upon the wishes of the children at the age of twelve who were extremely suggestible and reluctant to upset their parents and are very protective towards them.

[39] On the allegation of sexual abuse by the domestic worker, we found that the following findings of the learned JC were arrived at without sufficient judicial appreciation of the evidence:

> [34] Regarding the alleged sexual abuse by PW14 against the said boy, it is to be noted that sexual offences are offences in secret and I find the evidence of RW to have been corroborated by the evidence of RW2 who saw the incident with her own eyes. It was further corroborated when PH admitted in his evidence when he asked his son about the incident where the said child said "Kakak touched my kuku-bird and I liked it" .... To any

A informed mind, any sexual allegation from a child should not be simply brushed aside because the child generally do not know how to lie on matters that's not within their knowledge and all the more so when the said child was not even four (4) years old then, who can described what PW14 did to his private part (which he referred to as kuku-bird) and one wonders how a child of that age knows about the sexual act, i.e. "the B doggy style sex position" with the toys at the playground ... RW had acted correctly on the incident between the said boy and the maid by lodging a police report asking for an investigation into the matter. In all the circumstances of the case, I find it improbable for RW to concoct these stories as she is a highly educated woman that would have understood the repercussions of perjury and how it would impact her right for custody C care and control of the said children in these proceedings.

[40] The learned JC accepted the evidence of RW on the allegations of sexual abuse by PW14. The acceptance of the evidence of RW is with respect, erroneous as the learned JC failed to consider and evaluate the D evidence adduced by several independent professional witnesses.

[41] The Welfare Officer, Puan Rohaya binti Ramli (PW3) was responsible in investigating the allegations that PW14 had sexually abused LXJ. Her evidence did not support the finding of the learned JC on the sexual abuse of LXJ. PW3 had stated *inter alia* that "kanak-kanak tiada kesan deraan E emosi, fizikal atau perlakuan seksual, ... yang disyaki oleh.. pembantu rumah.". Her finding was recorded contemporaneously in a letter dated 10 March 2016 to the Pegawai Perubatan Hospital Shah Alam as follows:

> 2. Hasil perbincangan antara Pelindung JKM Shah Alam (Rohaya binti Ramli dan Pegawai Perubatan (Dr Nazalul) pada 10/03/2016 mendapati F hasil pemeriksaan kejadian **tidak seperti** yang didakwa oleh ibu kandung kanak- kanak. (emphasis added)

[42] The child psychiatrist from the Tunku Ampuan Rahimah Hospital, Dr Salinah Akhtar binti Mohd Yusof (PW6) who was part of the Suspected Child Abuse and Neglected (SCAN) Team testified on her assessment of G LXJ. It was the evidence of PW6 that children with suspected sexual abuse will have some sexualised behavior. This was how she explained herself:

> Sexual behavior in child can be presented in various ways. Sometimes ... fondling with themselves, sometimes they start touching inappropriately or asking certain sexual questions to parents, which is.. not appropriate for H that age ...

[43] Apart from stating that during her assessment of LXJ she did not see any sexualizing behavior, the evidence of PW6 also revealed that there was no post traumatic symptom on LXJ. Hence, there was no evidence from PW6 to lend credence to the findings of the learned JC that LXJ had been I sexually abused by PW14.

[44] There was also the evidence of the paediatrician, Dr Nazatul Haslina binti Ramly (PW10) who had conducted an examination of LXJ. PW10, another member of the SCAN Team likewise did not support the finding of the learned JC that LXJ had been sexually abused. For ease of reference we reproduce below the relevant part of her evidence (CB vol. 2: pp. 209-210):

> So, after, after examination, normal. We actually get the surgical team also to examine him and the MO, the medical officer examine him, the finding is also normal. Then, we refer the child to a child psychiatrist ... for her to assess the whole behavior, ... the patient's behavior.

[45] On the concerns of RW that LXJ had erection, PW10 stated, *inter alia,* that "even foetus, male foetus have erection in the uterus ... a man can have an erection when his bladder is full" and that "it is a very normal thing to have erection for a male of three years old.".

[46] The investigating officer, Inspector Noraida Hanim binti Ahmad Roslan (PW15), had stated quite categorically that "Puan Aleena (the RW) menegaskan yang report ini dibuat untuk rujuk kepada pihak mahkamah ... untuk proses perceraian.". It was also the evidence of PW15 that "... **kes ini tidak diteruskan**.". (emphasis added).

[47] Given the above testimonies of the independent witnesses of the paediatrician, the child psychiatrist, the welfare officer and the police officer, we found that the learned JC was plainly wrong in concluding that RW (RW1) and her mother, RW2 were witnesses of truth and that there was inappropriate behavior by PW14.

[48] Insofar as the allegation that LXJ claimed that PW14 had inserted a pencil in his anus as found in the notes of Dr Latchana a/p Tangarajo (RW3) was concerned, we noted that this claim came about from the translation/ interpretation of a Chinese doctor who did not testify. As such, it was our judgment that not much weight could be attached to the notes of RW3. Furthermore this allegation was never put to PW14 herself, which supports the argument of learned counsel for PH that this allegation was an afterthought (see *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639; *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300; *Kedah Cement Sdn Bhd v. Masjaya Trading Sdn Bhd* [2007] 3 MLJ 597). Likewise the allegation of 'doggie style sex position' was only raised by RW's counsel during the examination-in-chief of RW2.

[49] Further, we found that the learned JC had not fully appreciated the facts in coming to her decision. It was in evidence that LXJ had a medical condition called Hydrocele, *ie*, a swelling of the scrotum. PH and RW had begun the traditional treatment of applying betel leaves on LXJ's scrotum

before September 2015 and it was this traditional treatment that was carried out by the maid, PW14 on LXJ before the marriage broke down irretrievably. Thereafter, PW14 no longer carried out the traditional treatment. When LXJ referred to "kakak touched my kuku-bird", on the facts, that was in relation to the incident prior to the break-down of the marriage. The police report lodged by RW in February 2016 on the allegation of sexual abuse by PW14 in relation to the traditional treatment for the medical condition of LXJ, clearly cannot be maintained, in light of the circumstances as revealed in this case.

Conclusion

[50] For about two years, each party had the children's care and control on an alternate weekly basis. The order of the High Court had effectively disrupted the children's routine. Now that RW has remarried, the children's lives will be further disrupted and subjected to drastic changes, as they now have a step-father and step siblings.

[51] In seeking for the sole custody of the children, we found that RW was putting her own interest above that of the children's. RW had brought the children to the mosque and she had planned to enrol the children in an Islamic school, although it was agreed in the consent order of the court that the children shall not be influenced into embracing any new religion until they attain the age of majority. Having little regard for the safety of her children, RW had also on 6 June 2018, lost LYR after performing her prayers. LYR, on her own, had walked back to PH's house from the mosque, arriving at PH's house around 10pm, scared and in tears.

[52] In light of all the above, we found merits in the appeal. We, therefore allowed the appeal and we set aside the orders of the High Court on guardianship, custody care and control of the children save for prayers at paras. 53.8, 53.11, 53.13 and 53.14 of the hujahan balasan perayu dated 12 September 2018. PH was granted the sole guardianship, custody, care and control of LYR and LXJ and RW was granted access to the children (the details are as set out at paras. 53.2-53.7 in the hujahan balasan perayu dated 12 September 2018). We allowed the prayer sought for by PH that the matrimonial home be registered in PH's sole name and that the said property shall remain with and be retained by PH on condition that PH pays RW 25% of the current market value of the property as assessed by a licensed valuer, to be appointed by RW, with the costs of the appointment to be borne by PH and RW equally. We made no order as to the costs of the appeal. Liberty to apply.